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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACEBOOK, INC., and MARK ZUCKERBERG,

Plaintiff,

v.

CONNECTU LLC, (now known as CONNECTU, INC.), CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA, PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, WAYNE CHANG, DAVID GUCWA, and DOES 1-25,

Defendants.

CASE NO. C 07-01389 RS

DEFENDANTS CAMERON WINKLEVOSS, TYLER WINKLEVOSS, AND DIVYA NARENDRA'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Date: October 10, 2007
Time: 9:30 a.m.
Dept.: 4
Judge: Hon. Richard Seeborg

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I. INTRODUCTION

A party cannot argue facts and theories in a losing effort to convince a Court to exercise personal jurisdiction over a defendant, and later repeat the same arguments based on the same facts in a related litigation. Collateral and direct estoppel prevent such duplication of argument. These principles apply here to prevent Plaintiffs from arguing personal jurisdiction with facts and arguments relied upon and made before the Superior Court.

The Facebook, Inc. ("Facebook") earlier lost an argument in the Superior Court that a California Court could exercise jurisdiction over moving Defendants, Cameron Winklevoss, Tyler Winklevoss and Divya Narendra. Plaintiffs' Opposition contends that during the pendency of the Superior Court motion, they did not know certain circumstances or events now argued that support a California Court's exercise of jurisdiction over Moving Defendants. Not only is this contention false, Facebook actually cited to the very evidence it now contends it did not know in its Opposition to the Motion to Quash before the Superior Court. The onerous discovery Facebook insisted upon taking before filing that opposition revealed the facts Plaintiffs now want the Court to rely upon in finding jurisdiction over Moving Defendants. Facebook actually argued the facts and the theories that Plaintiffs contend were kept from them during this discovery. They cannot now be heard to raise these already-decided issues, particularly because Facebook failed to move for reconsideration or appeal the Superior Court Order, granting the Motion to Quash.

This motion should be granted based on direct and collateral estoppel, waiver, and Plaintiffs failure to produce any evidence that supports a finding of personal jurisdiction over Defendants.

II. FACTS

One month before the original complaint was filed in the Superior Court, Facebook took ConnectU's deposition in the Massachusetts case. As shown by the questions asked at this early deposition, Facebook had near complete knowledge about ConnectU's downloading of email addresses on Facebook's website. ConnectU's testimony in response to these questions provided Plaintiffs with whatever additional facts they did not have regarding ConnectU's various download activities of email addresses on the Facebook webstie.

> Q. Did you ever extract e-mails from Thefacebook?
> A. We -- yes, we have extracted e-mails from Thefacebook. . . .

A. We have extracted e-mails basically just, you know, following -- an e-mail has a -- at that point they had a URL, and you could follow that URL and it's completely authorized -- it's not unauthorized access, and you can follow that URL to find an e-mail address, yes, you could. And we did.
Q. So did you find a way to extract those e-mails without logging onto Thefacebook?
A. See, again, I don't remember -- I'm not a programmer, but it's my understanding that with unauthorized -- excuse me, with authorized -- without using unauthorized access those e-mails were accessible.
Q. And ConnectU took them? . . .
A. ConnectU followed an open URL, "open" being that it was accessible with not having to use unauthorized access, it was accessible, out in the open, and ConnectU followed those URLs and was able to collect e-mail addresses.
Q. And who did that?
A. Winston Williams.
Q. Winston Williams did that? And when did he do that?
A. I believe he did it in the spring of this year.
Q. Were those e-mails ever used by ConnectU?
A. I think we used some of them with the Social Butterfly software.
Q. And how were they used?
A. If a friend used Social Butterfly and wanted to invite their friends, then they could do that with Social Butterfly. (Mosko Decl. Exh. V-5-A, at 148 - 151)

So, fully understanding that ConnectU employed a program called "Social Butterfly" written by Winston Williams, to automatically access its website, download email addresses found on its website, and then invite Facebook members to join ConnectU, Facebook filed its lawsuit in the Superior Court. Specifically, Facebook accused ConnectU, Cameron Winklevoss, Tyler Winklevoss, Howard Winklevoss and Divya Narendra of accessing the Facebook website and downloading email addresses and other data. The key charging allegation is paragraph 19:

> ConnectU and other Defendants have gained unauthorized access to TheFacebook's web site, and have taken extensive amounts of proprietary data from TheFacebook, including but not limited to user data such as email addresses and other protected data collected and/or created by TheFacebook…(Mosko Supp. Decl. Exh. XVIII at ¶ 19)

Within thirty (30) days after the complaint was served, the individual Defendants filed a Motion to Quash because the Superior Court could not exercise personal jurisdiction over them. (Mosko Decl. Exh. V-2) Facebook convinced the Superior Court to allow it to take discovery[1] before it was required to file its opposition to the Motion to Quash. (Mosko Supp. Decl. Exh. XIX)

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[1] Plaintiffs divert this Court's attention to the issues in this motion by discussing the circumstances surrounding the discovery disputes in the Superior Court. Plaintiffs, *without one citation to support their claims* assert Defendants obstructed discovery. However, the Superior (continued…)

Facebook insisted that ConnectU and the individual Defendants provide detailed responses to each of its 345 interrogatories, 120 requests for production, and 125 requests for admissions. Defendants' responses to this discovery added detail to Facebook's knowledge about Defendants' actions of accessing the Facebook website and downloading email addresses. As a result of the written discovery responses and six (6) depositions, Facebook knew that defendants' email address downloading activities took two forms: one involving individual Defendants Cameron Winklevoss, Tyler Winklevoss and Divya Narendra personally accessing Facebook's website by using access information provided by their friends. Through this access, they were able to see Facebook members' email addresses. The individual Defendants manually copied these email addresses and later sent emails to these addresses inviting Facebook members to join ConnectU.

Each of the individual Defendants provided a similar written response to Interrogatory No. 7:

> ...On Different occasions, Responding Party [Cameron Winklevoss, Tyler Winklevoss and Divya Narendra] logged onto facebook.com. Responding Party's friends, including Mark Hall and Alexander Chastain Chapman, provided Responding Party with their log-in information for facebook.com and authorized Responding Party to use this log-in information to access and use the information provided on facebook.com...(Mosko Suppl. Decl. Exh. XXII-A to D)--*See also* responses to No. 8: "...E-mails to various e-mail addresses found on facebook.com were sent to invite these recipients to join ConnectU..." (*Id.*)

In addition to the manual downloads, Facebook received written discovery responses confirming what it already knew from the quoted Massachusetts Court deposition of ConnectU. The specific responses provided details of the automatic downloads effected through the efforts of Winston Williams from Pacific Northwest Software ("PNS"), with a software tool called "Social Butterfly." *See* e.g. supplemental response to Interrogatory No. 14, provided two (2) months before the hearing on the Motion to Quash:

> ConnectU retained Pacific Northwest Software for the purpose of developing and furthering the ConnectU website. Pacific Northwest Software was involved in creating and implementing an automated process for sending invitations to various email addresses found on facebook.com. Assisting with this automated process were Wayne Chang, David Gucwa, and Joel Voss. (Mosko Supp. Decl. Exh. XXIII at 4)

(...continued)
Court sided with Defendants on more than half of the disputed discovery issues. And, regarding the noticed depositions, the Superior Court found Facebook's attempt to inquire on 20 topics excessive, limiting inquiry to only three (3). (Mosko Suppl. Decl. Exhs. XIX, XX and XXI)

Additional discovery responses to Facebook's personal jurisdiction discovery were consistent with the above-quoted supplemental response to Interrogatory No. 14. *See e.g.* responses to California form Interrogatory No. 17.1 which requires a party to provide the bases for any denial to a Request for Admission. (Mosko Suppl. Decl. Exh. XXIV, Responses concerning RFA 12 and 13, at 5-6) Each of the above-mentioned discovery responses was served on Facebook prior to the depositions Facebook convinced the Superior Court were necessary in order to oppose the Motion to Quash.

Facebook's opportunity to learn more about this automated download process did not stop with the written discovery responses. Pursuant to the Superior Court's Order, Facebook took an additional five (5) separate depositions of ConnectU and the individual Defendants prior to filing its Opposition to the Motion to Quash. One of the deposition topics was: "actions taken on behalf of ConnectU related to actions in TheFacebook's website appropriating any information, data, and/or email addresses therefrom." (Mosko Supp. Decl. Exh. XXV, at 107) Facebook again demonstrated its detailed knowledge about ConnectU's downloads of the email addresses located on Facebook's website. Facebook followed up its earlier questions that were posed to ConnectU's witness during the deposition noticed in the Massachusetts case. (*Id.* at 82 - 87, 90 - 92)

After this detailed discovery, Facebook filed its Opposition to the Motion to Quash. Citing to both the discovery mentioned above as well as to the deposition of its CEO, and now Plaintiff Mark Zuckerberg, Facebook demonstrated that the allegations in the original complaint included the automated download process. As its opposition shows, Facebook quite clearly argued to the Superior Court that it should exercise personal jurisdiction over the individual Defendants as a result of their involvement in the automatic download process. Facebook's opposition reads, in part:

> Using the stolen information (some of which was obtained by a "Facebook Importer" program it developed for that purpose), ConnectU, through one or more Individual Defendants and another program called "Social Butterfly" distributed "spam" emails to lure Facebook users to become ConnectU users. (Mosko Decl. Exh. V-4 at 3, lines 22 - 25)

As partial support for this argument quoted immediately above, Facebook cited to Mr. Zuckerberg's deposition testimony where he demonstrated his and Facebook's knowledge of the "Social Butterfly" download process. This testimony concerned Mr. Zuckerberg's state of mind well before the Original Complaint was filed:

> So they were running a program that would take someone's users information for Facebook and then log in, and then go through and scrape everyone's email addresses off of Facebook who were that person's friends...(Mosko Decl. Exh. V-5 -Q, page 242, lines 12-16)

Individual Defendants responded to this argument. See Mosko Decl. Exh. V-6 at 3, line 24-4, line 16.

After Facebook completed this detailed discovery, and despite Facebook's argument, as shown above, that the automated download process should result in a finding that the Superior Court could exercise personal jurisdiction over the individual Defendants, that Court quashed the service of the summons and complaint because Facebook had failed to meet its burden of proving that the Court could exercise personal jurisdiction over the individual Defendants. (Mosko Decl. Exh. I)

Acknowledging the Superior Court's Order, Facebook filed its First Amended Complaint in which it deleted the three Winklevoss individuals and Divya Narendra as defendants. (Mosko Decl. Exh. II) As noted in the moving papers, Facebook did not move for reconsideration. Nor did Facebook appeal the Superior Court's Order.

Quite surprisingly, despite the finality of the Superior Court's order, Facebook and newly named Plaintiff Mark Zuckerberg renamed Cameron Winklevoss, Tyler Winklevoss and Divya Narendra as defendants in the Second Amended Complaint. As Facebook's opposition to this motion concedes, the allegations it pleads in this new complaint are, for all practical purposes, identical to those that they raised in the Opposition to the Motion to Quash, namely that personal jurisdiction should be found based on the automatic download process.

The primary charging allegation that defendants had accessed the website and downloaded data, including email addresses, found in the original complaint at paragraph 19, and quoted above, remained largely the same in the new pleading. The primary difference between paragraph 19 of the original complaint and the Second Amended Complaint is that the latter contains details of the earlier-alleged access to the website and downloading of email addresses. Most specifically the Second Amended Complaint repeats the access and download allegations, and also includes the automated download process, *earlier raised by Facebook in its opposition to the Motion to Quash*, as a basis for that Court to exercise jurisdiction over the individual Defendants: *See* Second

Amended Complaint, alleging that defendants "...gained access to the site and to steal information..." (SAC ¶ 22, at lines 24-25); defendants "gain[ed] access without permission, to Plaintiffs website [to] steal information..." (*Id.* at ¶ 26, lines 15-16). Details of Social Butterfly, which Plaintiffs learned during discovery, *and also argued to the Superior Court that such activities served as a basis for personal jurisdiction* are also pled: "Mr. Chang hired David Gucwa, a computer programmer, to write the programs necessary to retrieve email addresses..." (*Id.* at ¶ 28, lines 16-17) *See also* paragraphs 29, 30 and 33 for additionally pleaded details concerning the automated downloads, already argued before the Superior Court.

As discussed more fully below, Plaintiffs' Second Amended Complaint does not raise new facts that make its argument supporting jurisdiction any different than the argument Facebook made to the Superior Court. Contrary to their assertions, Plaintiffs knew about the automated download process well before the Motion to Quash was argued. Facebook specifically argued these facts before the Superior Court. Plaintiffs are estopped from relitigating these issues.

III. ARGUMENT

A. Plaintiffs are Barred by Collateral and Direct Estoppel From Relitigating Whether a California Court Can Exercise Personal Jurisdiction Over the Individual Defendants

The Superior Court's Order that a California Court cannot exercise jurisdiction over the individual Defendants, and the Plaintiffs' failure to move to reconsider or to appeal that decision, estops Plaintiffs from rearguing this issue. As shown in the Fact Section above, the issue before the Superior Court was whether the individual Defendants, through their manual downloads and use of email addresses, *and through the automatic download process*, are subject to the jurisdiction of a California court. The Ninth Circuit, interpreting California law recently held that although an earlier state court dismissal for lack of personal jurisdiction does not bar relitigation of the merits of the underlying action in a court of proper jurisdiction, such a dismissal "*does* bar re-litigation of 'issues necessary for the determination of jurisdiction.'" *Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 765 (9th Cir. 2007) (*quoting MIB, Inc. v. Super. Ct.*, 106 Cal.App.3d 228, 233 (1980)); *see also*

Sabek, Inc. v. Engelhard Corp., 65 Cal.App.4th 992, 998 (1998).[2] Because the Superior Court determined that California courts cannot exercise jurisdiction over the individual Defendants in a final, appealable order, *Sabek*, 65 Cal.App.4th at 999-1000, Plaintiffs are estopped from relitigating the issue of personal jurisdiction.

Plaintiffs argue that they have discovered new evidence that was not introduced to the Superior Court that thereby permits this Court to reexamine the jurisdiction question. As shown in the Facts Section above, that argument is untrue. And, in any event, as the Ninth Circuit has recently held, "evidence 'which was not introduced in the earlier proceedings' does not overcome the preclusive effect of the prior decisions." *Gupta*, 487 F.3d at 767. Moreover, any argument that the state court's decision was incorrect is irrelevant, as the Ninth Circuit has warned that "[e]ven if wrong, an earlier decision involving the same issue and the same parties, 'is as conclusive as a correct one.'" *Id.* Plaintiffs had a full opportunity to establish personal jurisdiction over the individual Defendants in the Superior Court and failed to do so. To use the blunt words of the Ninth Circuit, Plaintiffs do "not now get a do-over" in this Court[3]. *Id.*

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[2] Plaintiffs argue (Opp. at 11-12, fn.6) that the appealability of an order dismissing a defendant for lack of personal jurisdiction is the subject of competing appellate court decisions in California. However, such order is final and appealable according to *Sabek,* which states the current law in California. *See* Moving papers discussing *Sabek, at 3 - 6*. Plaintiffs "other line of cases" is based on *GMS Properties, Inc. v. Super. Ct.*, 219 Cal.App.2d 407, 410 (1963), a decision more than forty years old and questioned directly by the *Sabek* court. The supposed "line" of cases following *GMS* is an unpublished opinion. *See Carter v. Koh*, 2003 WL 21760109, at *3 (July 30, 2003) from the Fifth District Court of Appeal. As *Sabek* notes, the *GMS* decision cited an inapposite Ohio decision, and did not even discuss collateral or direct estoppel. *Sabek*, 65 Cal.App.4th at 1000. On the other hand, *Sabek* has been affirmatively cited in at least thirty subsequent decisions, and has not been questioned.

Plaintiffs then argue that even if the Superior Court's Order granting the Motion to Quash was a final appealable order in state court, when ConnectU removed this action to federal court, the finality of that decision transformed into a situation that would allow reconsideration in this Court. (Opp. at 9-10 n.4). This argument is nonsense. When the case was removed, this Court took the case, including the rulings and posture of it as it existed on the day it was removed. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70*, 415 U.S. 423, 436 (1974); *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 795 (9th Cir. 1996); *see also Resolution Trust Corp. v. United States Fidelity & Guaranty Co.*, 838 F. Supp. 276, 279-80 (M.D. La. 1993) (holding that because under applicable state law a partial summary judgment is a final, appealable order, the federal court could not reconsider the matter after removal). The issues of the lack of personal jurisdiction over individual Defendants had been finally resolved, and Facebook's failure to move for reconsideration or appeal rendered the Superior Court's Order final in all respects.

B. Plaintiffs Have Not Demonstrated the Existence of Evidence that Is New

Plaintiffs' argument that the existence of "new jurisdictional facts" prevents this Court from applying collateral or direct estoppel, is without merit.[4] As shown, the so-called "new jurisdictional facts" concern the automatic downloads. However, Plaintiffs knew about these downloads before they filed the original complaint. And, as shown, Plaintiffs argued that the automatic downloads should convince the Superior Court to exercise jurisdiction over Moving Defendants. (Mosko Decl. Exh. V-4, at 3, lines 22-25; 4, lines 11-15; 9, lines 9-12; 10, lines 8-10). Hence Plaintiffs claim of "new evidence" is untrue.

At best, the evidence that Plaintiffs assert as "new" is simply supplemental to the information Facebook already knew, relied upon and argued before the Superior Court during the Motion to Quash. As such, case law prevents this Court from considering it. For a court to consider potentially new evidence to support jurisdiction in a situation where it has already dismissed a defendant, a plaintiff must demonstrate that (1) the evidence is *actually* new or was at least previously unavailable to it; and (2) even if the evidence was previously unavailable to it, the proffering party must further demonstrate that the evidence does not merely go to the *weight* of the evidence already argued in that party's failed efforts. *Khanna v. State Bar of California*, 2007 WL 2611732, at *13 (N.D. Cal. Sep. 10, 2007); *Roos v. Red*, 130 Cal.App.4th 870, 888 (2005).

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[3] Plaintiffs citation to *Kendall v. Overseas Dev. Corp.*, 700 F.2d 536 (9th Cir. 1983) is inapposite because that court was determining the preclusive effect of a decision pursuant to the state law of Idaho. *Id.* at 537. The Ninth Circuit's recent decision in *Gupta v. Thai Airways* was decided under California law. 487 F.3d at 767. *Gupta* does not even cite to *Kendall*, proving that Idaho law is irrelevant to jurisdictional issues emanating from California. *Gupta* holds that preclusion applies when the same arguments made to the first court are made to the second. Here the facts Facebook argued included those concerning the automatic downloading of email addresses. (Mosko Decl. Exh. V-4, at 3, lines 22-25; 4, lines 11-15; 9, lines 9-12; 10, lines 8-10). Facebook lost that issue at the Superior Court. Here, Plaintiffs essentially seek reconsideration with repackaged facts and arguments already made to the Superior Court. However, California preclusion law states that "evidence 'which was not introduced in the earlier proceedings does not overcome the preclusive effect of the prior decisions." *Gupta*, 487 F.3d at 767 (*quoting MIB*, 106 Cal.App.3d at 235).

[4] Plaintiffs argument that (1) defendants' alleged misconduct during discovery (Opp. at 4, lines 13-19) or (2) Defendants' alleged inconsistency regarding the membership of individual defendants in ConnectU should prevent the application of the collateral on direct estoppel doctrines, is equally without merit. Plaintiffs' failure to cite to one alleged wrongful act proves this "misconduct" argument to be baseless. Plaintiffs never raised this "misconduct" argument to the Superior Court during the course of this discovery, that was completed over one year ago. This failure proves even Plaintiffs don't believe these allegations. Concerning the alleged inconsistency argument (i.e. the response to Interrogatory No. 14, and the subsequent testimony surrounding it), as shown in the Opposition to the Motion for Sanctions, the Massachusetts Court rejected that argument. *See also*, Mosko Suppl. Decl. Exh. XXVI, at 17 - 25. Defendants incorporate that opposition brief here, to the extent this Court finds any interest in this inconsistency claim as it impacts this Motion to Dismiss.

As shown in the Facts Section above, Plaintiffs' argument that the circumstances surrounding the automatic downloads will support a finding of personal jurisdiction over the individual Defendants was already made before the Superior Court. Plaintiffs knew about these downloads as proven by the Massachusetts deposition of ConnectU, and from the results of the onerous discovery Facebook insisted on taking before filing its opposition to the Motion to Quash.

Plaintiffs cannot support their repetitive comment[5] that the information on which they now rely to support personal jurisdiction, is "new." For support, Plaintiffs cite to Sutton Declaration Exhibits E, L, M, and P. None of the information in these documents however is "new." The documents found in Exhibit E were produced by ConnectU in the Massachusetts Action *well before Facebook filed its opposition to the Motion to Quash.* Exhibit E includes a series of unrelated emails some of which concern "Importer" or "Social Butterfly," the specifics of which were already known. Exhibit L contains PNS's documents, some of which are actually duplicates from ConnectU's earlier production of documents in the Massachusetts case. Compare for example, Exhibit L at PNS000842 to Exhibit E at C006535. These documents describe how Social Butterfly functioned. In light of the discovery and testimony cited in the Facts Section above however, Plaintiffs cannot claim the PNS documents provided new knowledge about the automatic downloads. Exhibit M discusses the progress of Social Butterfly, while Exhibit P shows the actual testing of the Social Butterfly software. Simply put, none of this evidence can be considered "new." Accordingly, Plaintiffs cannot now ask this Court to reconsider the Superior Court's Order based on evidence and knowledge that was available to Plaintiffs at the time of the order. *Engelhard Industries Corp. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963); *Graves v. Johnson Control World Services, Inc.*, 2006 WL 1308056, at *2 (N.D. Cal. May 11, 2006); *see also Khanna*, 2007 WL 2611732, at *13.

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[5] On no less than five (5) occasions, (Opp. p. 3, lns. 20-21; p. 8, ln. 25 et. seq.; p. 7 lns. 25-26; note 4 and p. 15, ln. 9 et. seq.), Plaintiffs argue that the information concerning automatic downloads is new. *See, e.g.,* note 4 of the Opposition where Plaintiffs assert the "factual predicate" upon which jurisdiction is now advanced was not known during the pendency of the Motion to Quash. However, the "factual predicate", i.e. the circumstances surrounding the automatic downloads were clearly known and argued by Facebook during the Motion to Quash.

Moreover, a review of each document found in the Sutton declaration shows Facebook either knew generally of or about facts discussed in those documents, or that the facts in those documents are irrelevant to the issues in this motion. For example, Exhibit N consists of documents produced by one of ConnectU's early web development companies, iMarc. Plaintiffs do not discuss how the iMarc documents are relevant at all. Even if they were, Plaintiffs fail to explain why these documents were not obtained earlier. *See Khanna*, 2007 WL 2611732, at *13 (noting that with "reasonable diligence" plaintiff could have previously obtained what it claimed was "newly discovered evidence" and therefore collateral estoppel applied).

Indeed, it is not clear how any of the documents cited by Plaintiffs could convince any court to exercise jurisdiction in California over the individual Defendants based on the effects test. *See Graves*, 2006 WL 1308056, at *2 (noting that in order to reconsider a decision based on newly discovered evidence it "must be of such magnitude that production of it earlier would have been likely to change the disposition of the case."). Plaintiffs argue that "the full import of Defendants' wrongdoing was not realized until PNS and Gucwa produced documents this year." (Opp. at 15, lines 12-13). Even assuming this is the case, Plaintiffs made a competent argument based on other evidence to the Superior Court that the "automatic process" should convince it to exercise jurisdiction over the individual Defendants. Plaintiffs are precluded from making this argument again.

Essentially, Plaintiffs' argument boils down to a claim that there is now *more* evidence to show that the individual Defendants were somehow involved in this "automatic process." Even if this evidence is sufficient to qualify as "newly discovered," collateral or direct estoppel would still apply because the new evidence goes only to the weight of the evidence in support of Plaintiffs' argument that California courts can exercise personal jurisdiction over the individual Defendants. *Khanna*, 2007 WL 2611732, at *13; *see also Roos*, 130 Cal.App.4th at 888 (applying collateral estoppel in the face of plaintiff's alleged new evidence because evidence only went to the weight of the evidence); *Evans v. Celotex Corp.*, 194 Cal.App.3d 741, 747 (1987) (same).

If Plaintiffs' evidence "does not establish a previously undiscovered theory [or] result in a change in the parties' legal rights," collateral estoppel and direct estoppel apply even in the face of new evidence." *Khanna,* 2007 WL 2611732, at *14; *Roos*, 130 Cal.App.4th. at 888. Here, Plaintiffs were aware of, and indeed made arguments regarding, the effect of the "automatic process" of downloading emails as it related to the exercise of personal jurisdiction. Thus, this is not an undiscovered theory, nor is there any change in the parties' legal rights.

C. Plaintiffs Have Waived All Arguments that the Automatic Process Is Sufficient to Exercise Personal Jurisdiction Over the Individual Defendants

More than one year after the Superior Court's order quashing service, Plaintiffs argue that a California court can exercise jurisdiction over the individual Defendants based on their alleged involvement in the "automatic process." Leaving the principles of collateral and direct estoppel aside, Plaintiffs are effectively asking for a reconsideration of the Superior Court's Order. Any reconsideration based on the argument that the "automatic process" is sufficient to support jurisdiction is inappropriate because Plaintiffs have waived this argument, as it was available to them in June 2006 when the state court heard the individual Defendants' Motion to Quash. Plaintiffs therefore cannot revive the argument before this Court. *See, e.g., Beverly v. Network Solutions, Inc.*, 49 U.S.P.Q.2d 1567 (Dec. 30, 1998). As shown in the Fact Section above, all of the facts necessary to make the argument that the effects of this "automatic" process were felt by Plaintiffs in California were available to Plaintiffs in June 2006.

Plaintiffs now claim that they either (1) did not argue the automatic downloads in a way that would have convinced the state court to deny the Motion to Quash (i.e., they have another legal theory now); or (2) that they did not raise the existence of the automatic downloads as a basis for asserting personal jurisdiction. However, as discussed above, collateral and direct estoppel bars the first, and Plaintiffs have waived the right to make the second argument. Facebook knew about the automatic downloads, and certainly knew about the individual Defendants' involvement (or lack thereof) with such automatic downloads. (*See* Section E, *Infra.*) Given this knowledge, Plaintiffs cannot fail to make the arguments regarding this information, and then later raise this information as a reason that the result should have been different. To the extent they had such knowledge and information and chose not to make it during the pendency of the Motion to Quash, such arguments are waived. *See e.g., Nobell, Inc. v. Sharper Image Corp.*, 1992 WL 421456, at *7 (N.D. Cal. April 17, 1992) ("If a party simply inadvertently failed to raise the argument earlier, the arguments are deemed waived."); *Novato Fire Protection District v. United States of America*, 1998 U.S. Dist. LEXIS 1219, at *2 (N.D. Cal. Jan. 26, 1998).

D. Plaintiffs' New Assertion that Jurisdiction over the Individual Defendants Can Be Asserted as a Result of the Manual Downloads Is Also Barred

In a remarkable argument, Plaintiffs now apparently contend that the Superior Court wrongly decided the Motion to Quash because Mark Zuckerberg was present in California as early as June 2004. (Opp. at 16, lns. 18-19) However, for the same reasons that they cannot re-argue the automatic downloads as the basis for jurisdiction, Plaintiffs are estopped from arguing this new and incredible position. *See* Sections, A, B, *supra*.

Plaintiffs obviously recognize that the Reply to the Opposition to the Motion to Quash established that neither Facebook, Inc. nor Zuckerberg were citizens or residents of California when the alleged wrongdoing occurred. So a California Court could not assert jurisdiction over individual Defendants on any basis because the alleged wrongful acts were not felt in California. Plaintiffs now concede that when Zuckerberg moved to California in June, 2004, he intended to stay, which means he would have become a citizen of California at that time. Of course, that argument would have been fatal to its position in the Massachusetts Court where Facebook and Zuckerberg had moved for dismissal based on a lack of diversity, where Facebook argued Zuckerberg was a New York citizen on the filing date of the Massachusetts case, September 2, 2004. So, Plaintiffs adopted the position that Zuckerberg remained a citizen of New York through September to support its Motion to Dismiss in Massachusetts. Now that it is convenient to do so, Plaintiffs change their tune, essentially asserting Zuckerberg intended to stay in California and was in California when the manual downloads occurred.

While clever and deceptive, this argument will not fly to justify a reversal of the Superior Court's order. Collateral estoppel principles preclude Plaintiffs from making this argument. And, in any event, for a party to claim the wrongful acts of another had an effect in a state, the complaining party must be a resident of the state when the wrongful acts occur. *See, e.g., Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). A "residence" has been defined by the California Supreme Court to mean "any factual place of abode *of some permanency*, more than a mere temporary sojourn." *Smith v. Smith*, 45 Cal.2d 235, 239 (1955) (emphasis added). The Massachusetts Court found that as of September 4, 2004, Zuckerberg was a resident of New York. (Mosko Suppl. Decl. Exh. XXVI, at 67 - 68) Hence, Plaintiffs' argument that Zuckerberg felt the effects of individual defendants' alleged wrongful acts in California, because he was temporarily in California, fails.

E. Plaintiffs Have Failed to Meet Their Burden of Demonstrating That This Court Can Exercise Personal Jurisdiction Over the Individual Defendants

Lost in their vain attempt to demonstrate how Defendants have allegedly misrepresented their position to this Court and the Massachusetts Court, Plaintiffs offer no argument supported by law that would allow this Court to exercise personal jurisdiction over each of the individual Defendants. It is well established law that the minimum contacts requirements relevant to specific personal jurisdiction must be met for *each individual defendant*. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980), *Intel FL., Inc. v. Container Land Assocs.*, 1997 WL 229951, at *3 (N.D. Cal. 1997)

The charging allegations assert that individual Defendants accessed Facebook's website, downloaded email addresses found on this website, and then used these email addresses to invite Facebook's members to join ConnectU. There were two types of downloads: (1) the manual downloads effected by Cameron Winklevoss, Tyler Winklevoss and Divya Narendra (Mosko Suppl. Decl. Exh. XXII-A to D), and (2) the automatic downloads effected through the "Social Butterfly" software written and implemented through the efforts of Winston Williams of PNS. (Mosko Supp. Decl. Exh. XXIII at 4.)

Regarding the manual downloads, as the Reply to the Opposition to the Motion to Quash clearly demonstrates, even if these downloads were wrongful--and defendants contend no wrongful acts occurred--these downloads did not affect a California citizen or resident. (Mosko Decl. Exh. V-7, at 3, lines 19-22). Neither Facebook, Inc., its predecessor TheFacebook. Inc., nor Mark Zuckerberg were residents, domiciliaries or citizens of California during the manual download process. (*Id.*) The Court cannot exercise jurisdiction regarding the manual downloads.

Regarding the automatic downloads, as indicated in the discovery responses, these were effected through the efforts of Winston Williams, PNS and David Gucwa. This information was conveyed to Facebook during the jurisdictional discovery period before the Motion to Quash was heard. Facebook raised and argued this as a basis for jurisdiction, and individual Defendants responded. As discussed in the Reply to that Motion, the only way a California Court could exercise jurisdiction over Cameron Winklevoss, Tyler Winklevoss, or Divya Narendra for these automatic downloads would be if they "personally directed or actively participated in the tortious conduct, and that conduct must have been purposefully directed toward the forum state." (*Id.* at 5, lines 25-27).

So, as demonstrated in Sections A, B, above, the issues and circumstances surrounding the manual downloads, the issues and circumstances surrounding the automatic downloads, and the law as it concerns both were directly raised, cited, and argued during the pendency of the Motion to Quash. Facebook specifically argued that both the manual and automatic downloads should convince the Superior Court to exercise jurisdiction over the individual Defendants. (Mosko Decl. Exh. V-4, at 3, lines 22-25; 4, lines 11-15; 9, lines 9-12; 10, lines 8-10). Plaintiffs knew the circumstances of both the manual and automatic downloads, and knew how the individual Defendants were involved with the downloads. Plaintiffs submit to this Court that they have obtained new evidence regarding the individual defendants that demonstrates that "[b]oth importer and Social Butterfly were paid for, developed, implemented, and maintained at Defendants' instructions." (Opp. at 14, lines 25-26). But evidence regarding this activity was already before the Superior Court. In support of this statement, Plaintiffs cite to Ex. E at 11073, a document that was produced by ConnectU in the Superior Court. Plaintiffs citation to Ex. L at 571135-38, 1759-1777, Winston Williams's timesheets produced by PNS, do not demonstrate that the Plaintiffs became aware of any additional evidence that was not already before the Superior Court. Instead, *See* Supplemental Declaration of Scott R. Mosko, Exh. XXV at 103 - 11, Exh. XXVII and Exh. XXVIII.

The Superior Court granted the Motion to Quash. As Sections A and B establish, collateral and direct estoppel bar Plaintiffs from re-arguing here that a California Court can exercise personal jurisdiction over the individual Defendants. And, to the extent stronger arguments could have been made before the Superior Court, but were not, said arguments have been waived. *See e.g., Nobell,* 1992 WL 421456, at *7; *Novato Fire Protection*, 1998 U.S. Dist. LEXIS 1219, at *2.

Nothing has changed regarding the facts preventing a California Court from exercising personal jurisdiction over the individual Defendants since the Superior Court's Order. The manual downloads occurred before Plaintiffs established residency in California, so jurisdiction cannot be based on the manual downloads.

Plaintiffs do not and cannot cite to any "new" facts as they concern personal jurisdiction law that were not known to them prior to the hearing on the Motion to Quash. As shown, they are estopped from asserting these now stale facts in a newly repackaged motion that simply incorporates arguments and issues that either were presented or should have been presented to the Superior Court. *Gupta*, 487 F.3d at 767; *Sabek*, 65 Cal.App.4th at 999-1000.

F. This Court's Order Finding Jurisdiction Over Co-Defendants Williams and PNS Does Not Support a Finding of Jurisdiction Over Cameron Winklevoss, Tyler Winklevoss or Divya Narendra

In another surprising argument, Plaintiffs assert that this Court denied Williams' and PNS's Motion to Dismiss because it rejected the claim that Williams and PNS were acting in their corporate capacity. (Opp. at 16, lines 2-4) ("Like Defendants, PNS and Williams argued they should be shielded from liability because they were acting in an 'official,' corporate' capacity, and this Court rejected that argument when it denied their Motion to Dismiss."). Plaintiffs continue that because this Court denied Williams' and PNS's Motion, so too should it deny the current motion. However, this Court's Order denying Williams' and PNS's motion does not make any reference to the corporate capacity status as impacting its decision.

Indeed, there is no basis set forth in the Order denying Williams' and PNS's motion that requires the denial of the current motion.

IV. CONCLUSION

For the reasons set forth in the moving papers and the reasons and arguments set forth above, Moving Defendants' Cameron Winklevoss, Tyler Winklevoss and Divya Narendra's Motion to Dismiss for Lack of Personal Jurisdiction, or in the alternative, Motion to Strike, should be granted.

Dated: September 26, 2007

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.

By: /s/
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